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Supreme Court, U. S.
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MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

Docket No 73-96

CHARLES WOMACK,

*Petitioner.*

*v.*

UNITED STATES OF AMERICA,

*Respondent,*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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*v.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner per his Attorney, Kenneth E. Bruce, Esq., respectfully shows and alleges as and for his Petition for a Writ of Certiorari:

1. Petitioner seeks to have reviewed an Order of the United States District Court for the Southern District of the State of New York, dated the 1st day of September, 1972, which order denied the Petitioner's Motion to Suppress the admission into evidence of a shotgun, allegedly recovered from the apartment of Petitioner, which shot-

gun was seized as a result of a "No-Knock" Search Warrant.

Further, the Judgment of Conviction entered after trial by jury on the 13th day of December, 1972, at which trial the aforementioned shotgun was admitted into evidence against the Petitioner herein.

Further, the Order by the United States Court of Appeals affirming the decision of the District Court, entered and filed on the 11th day of June, 1973, and the Notice of said Order having been received by mail by the Attorney for the Petitioner on the 23rd day of June, 1973.

Further, the Order dated the 25th day of June, 1973, denying the Petitioner the right to have the issuance of the Mandate of the United States Court of Appeals for the Second Circuit stayed, executing his two year concurrent sentence for the possession of a shotgun and the failure to register same.

Further, the Order dated the 27th day of July, 1973, denying the Petitioner's Motion for reconsideration of his Motion to stay the issuance of the aforesaid Mandate, pending a review of this Court of the Petition filed herein for the issuance of a Writ of Certiorari to review the Order and Judgment of the District Court, and the affirmance thereof of the United States Court of Appeals for the Second Circuit and the Orders, respectively, thereof denying applications of Petitioner to Stay the execution of the Petitioner's sentence pending a review of the application presented herein.

All of which said Orders were rendered without decision.

2. The jurisdiction of this Court is proper in that the Petition herein is filed as pursuant to the Rules of the Supreme Court and is taken by way of a Petition for a

Writ from the affirmance of the District Court's judgment by the Court of Appeals for the Second Circuit, and that there is a violation of the Fourth Amendment of the Constitution of the United States.

3. The Judgments sought to be reviewed are the December 13th, 1972 District Court judgment and the affirmance thereof of the District Court's Judgment on June 11th, 1973, by the Court of Appeals for the Second Circuit, and the interim orders made therein denying the Petitioner's motion to suppress the aforesaid shotgun, said motion made prior to trial in the District Court.

4. The basic question presented in this Petition for review is:

Whether the *incorrect* address of the premises actually searched as stated in the Search Warrant as issued for the search of the Petitioner's apartment, was sufficient to comply with the bare language of the Fourth Amendment to the United States Constitution, in that . . . "particularly describing the premises to be searched. . . ."

It is submitted that the Search Warrant as issued described one 870 Elsmere Place, Apt. 2A, County of the Bronx, occupied by one Louise Brooks, when the apartment actually entered by means of a sledge hammer was in the early hours of the morning, and searched, was apartment number 2A located in 866 Elsmere Place, County of Bronx and occupied by the Petitioner.

That the two buildings were separate and distinct with separate entrances, separate outer door bells and tenant listing, and in no fashion connected with each other, other than being adjacent to and . . . connected with one another by the same building material.

That the building numbered 870 had clearly inscribed upon its exterior 870, and the tenant, Louise Brooks, actu-

ally was the tenant of Apartment 2A, in said building and said tenant had no connection with the apartment of the Petitioner, nor did her apartment have any common doorway, entrance or connecting hallway.

That as a result of "alleged" surveillance of the building, a multiple dwelling, the arresting officer observed certain alleged known addicts to enter the building where the Petitioner had an apartment and from a "reliable informer" as alleged, information was given by said informer that certain narcotics were on the premises of the apartment rented by the Petitioner.

That further, inquiry was made by the said peace officer of Consolidated Edison Company in New York City, who indicated that Louise Brooks occupied the apartment at 870 Elsmere Place, Bronx, New York, Apartment 2A.

That the investigation was grossly inadequate as to ascertain the particular address of the place to be searched, and the *bare conclusions* of the officer executing the Search Warrant was without probable cause as no statement or fact was made as to how the officer knew that the persons entering the building of the Petitioner, whose address was 866 Elsmere Place, were addcits, or that they after entering the building as alleged went to the apartment of the Petitioner, one of many apartments in a five-story multiple dwelling, in front of which dwelling there were some ten garbage cans boldly inscribed with the numeral "866", patently indicating that the building was numbered 866 and was not 870 as the officer was informed, and who could easily have observed, if there was any observation of the subject premises, that the building was separate and distinct from the building clearly marked to be "870".

That the mandate of a warrant must be strictly construed and the interpretation of same cannot be left to the discretion of the executing officer and said warrant can only be issued upon probable cause.

That to justify the execution of a warrant which runs to and is issued to *any peace officer* by the subjective state of the officer's mind is to justify the end of the means, and which position would logically give license and authority to any peace officer to invade and break the close of any home irrespective of what particularity of the premises to be searched is given in the search warrant.

Obviously the Fourth Amendment was to protect persons against unreasonable search, not tested as the court below would mandate purely on the *subjective state* of the officer's mind, and not on what the premises was actually stated to be in the warrant predicated on the affidavit submitted in support thereof based upon probable cause.

The fact that the Officer executing the Search Warrant knew or had reason to know the place he wished to search is an unreasonable search, when the place actually searched was not connected even remotely or in common with any facility of the place described in the search warrant.

The warrant gave no other identifying data than *the wrong number and name of the tenant.* It has been held that where the place to be searched was sufficiently identified in spite of a wrong address as stated in the warrant, so that no reasonable person could be misled, and there could be no exercise of discretion the wrong address would constitute harmless error and practical accuracy would not be sacrificed for technical nicety.

This was not the case at bar.

To clothe a police officer with greater authority than is given by a warrant to search is to encourage license and is defeating the aim and intent of the Fourth Amendment against unreasonable search and tyranny.

The recent wide scale national abuses as committed by law enforcement officers, would be intensified if the subjective test and not objective standards in the issuance and execution of a Search Warrant were to prevail.

The decision of the lower Court would lead to anarchy and would subvert the plain meaning of the Fourth Amendment in requiring that the place to be searched be particularly described. Again, this was not the case at bar, and therefore the decision of the Court below is erroneous and must be reversed as one of plain error.

WHEREFORE, in view of the established constitutional protection that would be negated by the affirmed decision of the Court below, the Petitioner respectfully demands that a Writ of Certiorari issue reviewing the decision of the District Court in denying the Petitioner's Motion to Suppress the aforesaid evidence admitted against him and resulting in a Judgment of Conviction, and the affirmance thereof by the Court of Appeals, and such other and further relief as the premises may warrant and the interest of justice may serve.

Respectfully submitted,

KENNETH E. BRUCE,
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Telephone: 212 865-8910

## Exhibit 1 (Judgment of United States Court of Appeals), Annexed to Petition

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

73-1078

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of June one thousand nine hundred and seventy-three.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge
HON. J. JOSEPH SMITH,
Circuit Judge
HON. FREDERICK P. RYAN,
District Judge

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES WOMACK, RUBY BEARD,

Defendants,

CHARLES WOMACK,

Defendant-Appellant.

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*Exhibit 1 (Judgment of United States Court of Appeals), Annexed to Petition*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

## Exhibit 2 (Indictment) Annexed to Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

CHARLES WOMACK and RUBY BEARD,

Defendants.

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The Grand Jury charges:

On or about the 10th day of December, 1971, in the Southern District of New York, Charles Womack and Ruby Beard, the defendants, unlawfully, wilfully and knowingly did receive and possess a firearm, to wit, a 12-gauge shotgun having a barrel of approximately 11¼ inches in length, which was not then registsered to either or both of them in the National Firearms Registration and Transfer Record.

(Title 26, United States Code, Section 5861(d) and Title 18, United States Code, Section 2.)

SECOND COUNT

The Grand Jury further charges:

On or about the 10th day of December, 1971, in the Southern District of New York, Charles Womack and

*Exhibit 2 (Indictment), Annexed to Petition*

Ruby Beard, the defendants, unlawfully, wilfully and knowingly did receive and possess a firearm, to wit, said firearm described in Count One herein, which was not identified by a serial number as required by Chapter 53 of the Internal Revenue Code of 1954, (26 U.S.C. § 5801-5872).

(Title 26, United States Code, Section 5861(i) and Title 18, United States Code, Section 2.)

VECTOR A. LAWSKI,
Deputy Foreman 1-13-72

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

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Jan. 24, 1972—Ruby Beard. Abraham Solomon, Esq., assigned as attorney pursuant to C.J.A. Pleads not guilty— released on own recognance. Motions set 2-9-72 subject to approval of assigned judge. Charles Womack—Court advised deft. is presently in Bronx County Jail. B/W ordered lodged as detainer. Court directs entry of plea of not guilty. Tyler, J.

June 29, 1972—Charles Womack not present. U. S. Atty. John C. Cabeltin and Atty. for deft. Stuart R. Shaw. Bench warrant ordered for Charles Womack at 10:10 A.M. Suppression hearing held and adjourned to July 3, 1972 at 2:30 P.M. Room 102. D. Wyatt, J.

*Exhibit 2 (Indictment), Annexed to Petition*

July 5, 1972—Suppression hearing continued and adjourned to Aug. 21, 1972, 2:30 P.M. Rm. 102 (Womack). Bench Warrant vacated. Wyatt, J.

Aug. 21, 1972—Suppression hearing continued and concluded. Decision reserved. Wyatt, J.

Oct. 30, 1972—Trial begun before Levet, J. with a jury as to both defts.

Oct. 31, 1972—Trial continued.

Nov. 1, 1972—Trial continued—and concluded—jury verdict—Deft. Womack, guilty on counts 1 and 2. Deft. Beard not guilty on counts 1 and 2. Jury polled. Jury excused. Deft. Womack moves to set aside the verdict—denied. PST ordered—Sentence on 11-29-72 at 10 A.M. R. 128. Bail fixed in the sum of $1,000—Bail to be posted by Friday (11-3-72) at 2 P.M.

Dec. 13, 1972—AUSA Feinberg. Deft. Charles Womack (Atty. present) Kenneth Bruce. Sentenced to two (2) years on each of counts 1 and 2 to run concurrently with each other at a place of confinement to be designated by the Atty. General of the U. S. Deft. advised of his right to appeal. Bail fixed at $2,000.00 pending appeal to be posted by Friday 12-15-72 at 11 A.M. Levet, J.

## Exhibit 3 (Search Warrant), Annexed to Petition

I, Leo Levy, Clerk of the Supreme Court, County of Bronx, do hereby certify that the annexed is a copy of a bench warrant now on file in the Clerk's Office and that the same has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

Given Under my hand and attested by the seal of the said County this 28th day of June, 1972.

Leo Levy
Clerk of the Supreme Court, Bronx County

*Exhibit 3 (Search Warrant), Annexed to Petition*

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF BRONX

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
TO ANY PEACE OFFICER IN THE CITY OF NEW YORK

Proof by affidavit having been made this day before me by Stephen Kanapes that there is probable cause to believe that there is in apartment 2B in premises 870 Elsmere Place, Bronx County, occupied by John Doe "Shorty" narcotics, to wit: Heroin the means of committing a crime or offense and the means of preventing a crime or offense from being discovered,

YOU ARE THEREFOR commanded, during the daytime and nighttime, to make an immediate search of apartment 2B in premises 870 Elsmere Place, Bronx County, occupied by John Doe "Shorty" and of the person of John Doe "Shorty" and of any other person who may be found therein to have such property in his possession or under his control or to whom such property may have been delivered, for narcotics, to wit: Heroin the means of committing a crime or offense and the means of preventing a crime or offense from being discovered, that you may open any outer or inner door or window of the aforementioned premises without giving notice of your purpose and authority to execute said warrant and if you find any such property or evidence or any part thereof to bring it before the Court at the Court House, 851 Grand Concourse, Bronx County.

This warrant must be executed not more than ten days after the date of issuance.

Dated: Bronx, New York, this 9th day of December 1971.

S H A
Justice of the Supreme Court
SIDNEY H. ASCH
Justice of the Supreme Court
of the State of New York

*Exhibit 3 (Search Warrant), Annexed to Petition*

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter

*of*

the application of STEPHEN KANAPES of the Police Department of the City of New York for a warrant authorizing the search of apartment 2B in premises 870 ELSMERE PLACE, Bronx County, occupied by JOHN DOE "SHORTY" and of the person of JOHN DOE "SHORTY" for narcotics, to wit: heroin, the means of committing a crime or offense and the means of preventing a crime or offense from being discovered.

STATE OF NEW YORK }
COUNTY OF BRONX } ss.:

STEPHEN KANAPES, being duly sworn, deposes and says:

I am a Patrolman in the Police Department of the City of New York, assigned to the Narcotics Division.

I have received information from a reliable informant, known and identified to me, who has given information in the past leading to at least three (3) arrests and convictions in narcotics cases, that John Doe "Shorty", described as male, negro, 5'5", 165-170 lbs. approximately 40 years of age, occupying apartment 2B in premises 870

*Exhibit 3 (Search Warrant), Annexed to Petition*

Elsmere Place, Bronx County, is in possession of and trafficking in narcotic drugs, to wit: heroin, thereat. My informant further stated that during the week of November 21, 1971 my informant was present in the aforementioned premises and did see a quantity of narcotics, to wit: heroin, therein under the control of and in the possession of the said John Doe "Shorty".

That the identities of my informant and of the persons arrested as a result of information supplied by my informant are recorded. These identities are available to the Judge or Justice who is to determine the existence of probable cause for the issuance of the annexed warrant and order of seizure.

That your deponent has conducted an independent investigation which reveals that the said apartment is leased by one Louise Brooks. That your deponent has made independent observations at the aforesaid apartment and specifically on November 25, 1971, between the hours of 1:10 P.M. and 2:10 P.M. your deponent observed three (3) known drug users enter and leave the said apartment and on November 29, 1971, between the hours of 9:00 P.M. and 9:45 P.M. your deponent observed six (6) known drug users enter and leave the said apartment and on December 6, 1971, between the hours of 3:15 P.M. and 4:30 P.M. your deponent observed eight (8) known drug users enter and leave the said apartment.

That based upon the foregoing reliable information and upon my own observations and investigation, there is probable cause to believe that John Doe "Shorty" occupying apartment 2B in premises 870 Elsmere Place, Bronx County, is in possession of and trafficking in illicit narcotic drugs, to wit: heroin, thereat.

*Exhibit 3 (Search Warrant), Annexed to Petition*

That because of the easily disposable nature of the contraband involved herein, it would be very easy to dispose of same while your deponent was in the process of knocking on the door and stating the purpose of his desired entry.

WHEREFORE, I respectfully request that the Court issue a warrant and order of seizure in the form annexed authorizing the search of apartment 2B in premises 870 Elsmere Place, Bronx County, occupied by John Doe "Shorty", and of the person of John Doe "Shorty" and of any other person who may be found therein to have such property in their possession or to whom such property may have been delivered, for narcotics, to wit: heroin, and that I be allowed to make entry to the said premises without giving prior notice or stating my purpose and authority and directing during the day time or nite time and directing that if such property or evidence or any part thereof be found that it be seized and brought before the Court, together with such other and further relief that the Court may deem proper.

No previous application in this matter has been made in this or any other Court or to any other Judge or Justice.

STEPHEN KANAPES

Sworn to before me this
9th day of December, 1971.

S. H. A.
Justice of the Supreme Court.
SIDNEY H. ASCH
Justice of the Supreme Court
of the State of New York

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-96

CHARLES WOMACK, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The sole issue is whether a search with a warrant of petitioner's apartment was unlawful because the address furnished to the magistrate by the officer who secured the warrant and executed it was later discovered to be incorrect.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possessing a firearm which had not been lawfully registered and which failed to contain a serial number, in violation of 26 U.S.C. 5861(d) and (i). He was sentenced to concurrent terms of imprisonment for two years. The court of appeals affirmed without opinion (Pet. 7-8).

The shotgun which forms the subject matter of petitioner's prosecution was found under a bed in the course of a search of petitioner's apartment (H. 28). Petitioner's

premises were located within a Bronx, New York, apartment building containing three entrances. The middle entrance bore address 870 on the outside, while the other entrances had no address designation (H. 14).[1]

In November 1971, a reliable informant[2] told New York City plainsclothes policeman Stephen Kanapes that narcotics were being dispensed from Apartment 2B, 870 Elsmere Place, Bronx, New York, and that the apartment was reached by using the entrance farthest to the right of the apartment building (H. 18). The informant identified the seller as "Shorty," and stated that he had personally seen heroin in the apartment (H. 6). On November 25, 1971, Kanapes and his team members, Officers Hanbrecht and Krantz, conducted a surveillance of the apartment building from Kanapes' privately owned vehicle. They saw the informant and an unknown friend enter the building from the entrance to the right (H. 9). Within an hour they also observed three known narcotics addicts use the same entrance and depart (H. 18-19). Then the officers met with the informant, who said that he had gone to Apartment 2B and had seen heroin there. The informant described "Shorty" as being 5' 5" tall and weighing about 165 or 170 pounds (H. 19).

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[1] We are lodging with the Clerk of this Court the transcript of the hearing on petitioner's pretrial motion to suppress ("H.").

[2] Patrolman Stephen Kanapes testified that in two years the informant had furnished information leading to the arrests of more than two hundred individuals; that Kanapes had personally made 35 of these arrests and members of his team 125; and that ninety percent had resulted in convictions (H. 6-8).

On November 29, 1971, Kanapes and his team members conducted another surveillance of the building and saw the informant, his friend, and six known addicts enter 870 Elsmere Place from the right entrance (H. 20). On December 6, 1971, the team observed eight known addicts enter and leave the building from the door on the right (H. 20-21). Kanapes then received information from the electric utility company that Apartment 2B, 870 Elsmere Place was registered in the name of one Louise Brooks (H. 21).

On December 9, 1971, Officer Kanapes furnished an affidavit containing his and the informant's observations to a local judge and was issued a warrant authorizing entry to search either in the day or night "apartment 2B in premises 870 Elsmere Place, Bronx County, occupied by John Doe 'Shorty' * * *" (Pet. 13-16). Later that day Kanapes told the informant to notify the policemen as soon as he knew that drugs could be found in the apartment. At midnight Kanapes received a telephone call from the informant who said that the premises should be searched. Three hours later, the search of the apartment was conducted, and forty-five glassine bags, marijuana, narcotics paraphernalia, a shotgun shell, and a shotgun were found (H. 23-28). Petitioner, who fit the description and answered to the name of "Shorty," was one of those arrested there (H. 48).

On the following day the policemen received information that an individual had been found bound, gagged and murdered in front of Apartment 2B, 866 Elsmere Place (H. 29-30). On further investigation the officers learned that the three entrances to the structure in which petitioner resided bore separate addresses; that the address of the middle entrance was 870; but the addresses of the left and right entrances, which had no visible numbers,

were 874 and 866 respectively (H. 29, 32-33). Accordingly, the entrance which they had believed to be part of 870 in fact was 866 Elsmere Place. Apartment 2B at 866 Elsmere Place had been leased to Ruby Beard, who lived there with petitioner. Petitioner had also signed the lease as "Charles Beard" (H. 65).

Petitioner's claim, that the search was fatally defective because the actual address of the premises searched (866 Elsmere Place) differed from the one described in the warrant (870 Elsmere Place), is without merit. The outward appearance of the three entrances gave no reason for the officers to believe that the address of the entrance to the right was not the same as that of the middle entrance. See *United States* v. *Santore*, 290 F. 2d 51, 66-67 (C.A. 2), certiorari denied, 365 U.S. 834. The apartment actually searched was the one intended to be searched. The officers who performed the search were thoroughly familiar with the physical location of the apartment, which was understandably described in the warrant as 870 Elsmere Place, No. 2B. It is enough if the description is such that the officer with the search warrant can with reasonable effort ascertain and identify the place intended. *Steele* v. *United States, No. 1*, 267 U.S. 498, 503. Accordingly, the post-search discovery that the exact address of petitioner's premises was misdescribed in the warrant did not invalidate the search. See *United States* v. *Melancon*, 462 F. 2d 82, 94 (C.A. 5), certiorari denied, 409 U.S. 1038; *Wangrow* v. *United States*, 399 F. 2d 106, 115 (C.A. 8), certiorari denied, 393 U.S. 933; *Hanger* v. *United States*, 398 F. 2d 91, 98 (C.A. 8), certiorari denied, 393 U.S. 1119; *United States* v. *Goodman*, 312 F. Supp. 556, 558 (N.D. Ind.); *United States* v. *Gomez*, 42 F.R.D. 347 (S.D. N.Y.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1973.

DOJ-1973-09